82-1239

No.

IN THE SUPREME COURT UNITED STATES OF AMERICA

October Term 1982

GARY WAYNE DENEEN,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW.

Was there a violation of a plea agreement entitling Petitioner to be resentenced where the Prosecution as part of the plea agreement promised that the Government would take no position regarding sentence, but at a hearing on Petitioner's Motion to Reduce Sentence, took a position requesting that the Court not disturb the nine (9) year sentence previously imposed on Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOW COMES Petitioner, GARY WAYNE DENEEN, by his attorney, Edward Wishnow, and petitions that this Court issue a Writ of Certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit, and in support thereof says:

1. QUESTIONS PRESENTED FOR REVIEW.

Was there a violation of a plea agreement entitling Petitioner to be resentenced where the Prosecution as part of the plea agreement promised that the Government would take no position regarding sentence, but at a hearing on Petitioner's Motion to Reduce Sentence, took a position requesting that the Court not disturb the nine (9) year sentence previously imposed on Petitioner.

2. REPORTS OF OPINIONS DELIVERED IN THE COURT'S BELOW.

The United States Court of Appeals for the Sixth Circuit in its Order dated September 17, 1982 (Hoffman[1], Senior

[1]Hon. Walter E. Hoffman, Senior Judge, United States District Court for the Eastern District of Virginia sitting by designation.

District Judge, concurring specially) affirmed the judgment of the District Court in denying Petitioner's Motion for Reduction of Sentence.

3. JURISDICTIONAL GROUNDS.

The Order sought to be reviewed is an Order of the United States Court of Appeals for the Sixth Circuit dated September 17, 1982, which affirmed a Judgment of the District Court.[2] Petitioner had taken a direct appeal to the Court of Appeals from a denial of his Motion for Reduction of Sentence brought pursuant to Federal Rules of Criminal Procedure 35.

On November 18, 1982, the Court of Appeals by its Order denied Petitioner's Petition for Rehearing Pursuant to Federal Rules of Appellate Procedure 40 and, in the Alternative, Suggestion for En Banc Determination Pursuant to Federal Rule of Appellate Procedure 35.

The jurisdiction of this Court is involked pursuant to 28 USC 1254(1).

4. COURT RULES INVOLVED.

Petitioner's Motion for Reduction of Sentence brought in the trial court was pursuant to Federal Rule of Criminal Procedure 35(b) which provides in pertinent that:

> "The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of

[2] Wendell A. Miles, United States District Judge for the Western District of Michigan.

incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

Petitioner's initial criminal case was disposed of in the trial court pursuant to a plea agreement taken in conformity with Federal Rule of Criminal Procedure 11(e) which provides in pertinent part:

> (1) In General. The attorney for the Government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case.
>
> The court shall not participate in any such discussions.

5. STATEMENT OF THE CASE.

Petitioner, GARY WAYNE DENEEN, was charged in a seventeen (17) count indictment in the Western District of Michigan with mail fraud in violation of 18 U.S.C. 1341, interstate transportation of stolen money and securities in violation of 18 U.S.C. 2314, and interstate transportation of falsely made, forged, altered or counterfeit securities in violation of 18 U.S.C. 2314. He was also charged in the Eastern District of Wisconsin in a four (4) count indictment with interstate transportation of falsely made, forged, altered or counterfeit securities. The Wisconsin case was

transferred to the Western District of Michigan pursuant to Federal Rules of Criminal Procedure 20.

The gist of the indictments were that DENEEN overfinanced the purchase of tow trucks by inflating the purchase price of the trucks and attached towing equipment through the use of fraudulent documents.

DENEEN ultimately pled guilty to one (1) count each of mail fraud, interstate transportation of stolen money and securities, and interstate transportation of falsely made, forged, altered or counterfeit securities. In exchange for the guilty plea, the Government agree to dismiss the remaining counts of the two (2) indictments and to take no position regarding the sentence to be imposed.[3]

At the sentencing date, but prior to imposition of the sentence, the Government again reiterated that the plea agreement involved the Government taking no position.[4] The District Court sentenced DENEEN to concurrent terms on the three (3) counts of five (5) years, nine (9) years, and nine (9) years respectively.

Within a few days of sentencing, DENEEN moved pursuant to Federal Rules of Criminal Procedure 35 for a reduction of sentence.

At the Rule 35 hearing, the Government submitted a written Memorandum in Opposition to Motion for Sentence Reduction. At the Rule 35 hearing, the Prosecutor further stated that DENEEN had freely lied, cheated and stole and

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[3] September 25, 1981, plea transcript page 7, by Martin Palus, Assistant United States Attorney: "It's also a part of the plea agreement as we understand it, your Honor, that the Government has agreed that it will take no position regarding the sentence to be imposed by the Court upon Mr. Deneen."

[4] November 9, 1981, sentence transcript, page 6, by Martin Palus, Assistant United States Attorney "It was part of the plea agreement that the Government would make no comment or recommendation regarding sentence."

that the Court had shown mercy in originally sentencing him and that the original sentence should remain.[5]

The Court in ruling against DENEEN'S Motion for Reduction in Sentence appeared to place great reliance on the Prosecutor's comments.[6] On December 7, 1981, the trial court entered an Order denying the reduction of sentence. DENEEN took a direct appeal from this Order to the United States Court of Appeals for the Sixth Circuit.

On September 17, 1982, the Court of Appeals by its Order affirmed the District Court's denial of a reduction of sentence. On September 25, 1982, DENEEN filed a Petition for Rehearing pursuant to Federal Rule of Appellate Procedure 40 and, in the Alternative, Suggestion for En Banc Determination Pursuant to Federal Rules of Appellate Procedure 35. The Court of Appeals pursuant to its Order dated November 18, 1982, denied DENEEN'S petition. This proceeding is a Petition for Writ of Certiorari to United States Court of Appeals for the Sixth Circuit.

6. ARGUMENT.

It is widely acknowledged that the vast majority of federal criminal cases are disposed of by way of guilty pleas at the trial court level.[7] The question presented for review by this Petition is an important question of Federal law which has not been, but should be, settled by this Court as plea bargaining and sentencing procedures occur in the majority of criminal cases brought in the United States

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[5] November 27, 1981, hearing transcript pages 74, 75 and 76.

[6] November 27, 1981, hearing transcript page 85, Hon. Wendell A. Miles, "The United States Attorney has put his finger on it . . ."

[7] In 1964, guilty pleas accounted for 90.2% of all criminal convictions in United States district courts. Ibid. In fiscal 1970, of 28,178 convictions in the 89 United States district courts, 24,111 were by pleas of guilty or nolo contendere. Report of Director of Administrative Office of U.S. Courts, for Period July 1 through Dec. 31, 1980, Table D-4, p. A-26. *Santobello* v. *New York* 404 US 257, 30 L Ed 2d 427, 92 S Ct 495 (1971), (Douglas, J., concurring) at 263 n.1.

District Courts and the issue here presented is thusly significant and applicable to general federal criminal jurisprudence. Intertwined with this question is whether the question presented for review in this Petition conflicts with the decision of this Court in *Santobello* v. *New York*, 404 US 257, 30 L Ed 2d 427, 92 S Ct 495 (1971).

Certiorari should also be granted in this case because the decision of the Court of Appeals for the Sixth Circuit is in conflict with a decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Ewing*, 480 F.2d 1141 (CA 5, 1973).

The focal point for an analysis of the impotance of the question presented for review in this Petition must be the *Santobello case, supra.* In *Santobello*, the petitioner pled guilty to a gambling offense. The Prosecutor agreed to make no recommendation as to the sentence. On the date set for sentencing, a new Prosecutor appeared and recommended the maximum one (1) year sentence. Over the defendant's objection that this was a violation of the Prosecution's promise, the Judge, nevertheless, sentenced the petitioner, indicating that he would not take into consideration what the Prosecutor said.

Prefatory to its holding, this Court commented on the importance of guilty pleas in the administration of justice when it stated:

> "The disposition of criminal charges by agreement between the Prosecutor and the accused, sometimes loosely called 'plea bargaining', is an essential component of the administration of justice. Properly administered, it is to be encouraged." at 260.

This Court held that "when a plea rests in any significant degree on a promise or agreement of the Prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." at 262. This Court remanded the case back to the state court for a determination as to whether there should be specific performance of

the agreement on the plea, in which case the petitioner should be resentenced by a different Judge or whether petitioner should be given the opportunity to withdraw his guilty plea.

Here, the Government by stating that it would take no position regarding sentence made a stronger, more binding and more enforceable promise then in *Santobello*, where the prosecution had promised to make no recommendation as to sentence. The appellate courts that have considered the applicability of *Santobello* to this distinction in promises made by the Prosecution, are uniform in holding that the promise of taking no position is fully enforceable against the Government notwithstanding the consequences. *United States* v. *Crusco*, 536 F.2d 21 (CA 3 1976), *United States* v. *Cook*, 668 F.2d 317 (CA 7 1982); Cf. *United States* v. *Miller*, 565 F.2d 1273 (CA 3 1977) and *United States* v. *Avery*, 621 F.2d 214 (CA 5 1980).

It is indisputable that had the Prosecutor in the instant case made his comments at Petitioner's sentencing, there would have been a breach of the plea agreement and DENEEN would be entitled to relief. The question presented by this Petition is whether there exists a breach of a plea agreement when the Prosecutor speaks out contrary to his agreement not to take a position at sentencing, not at the original sentencing, but at a motion to reduce sentence pursuant to Federal Rules of Criminal Procedure 35.

In the *Ewing case, supra*, the Court of Appeals for the Fifth Circuit found a violation of a plea agreement where the Government, although fulfilling its promise not to oppose probation at sentencing, opposed probation at a Rule 35 motion for reduction of sentence. Ewing had pled guilty to two (2) counts of aiding and abetting the interstate transportation of stolen motor vehicles in return for the Government's promise to dismiss the remaining three (3) counts of the indictment and not oppose a probation sentence. The court sentenced Ewing to four (4) years and three (3) years

on the two (2) counts, the sentences to run consecutively. Ewing then filed a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. At the Rule 35 hearing, the Government was represented by a different prosecutor who opposed Ewing's request for probation. The trial court stated that it would not be influenced by the recommendations of the Government, but nevertheless, denied defendant's motion to reduce sentence.

The Court of Appeals found guidance for its decision in the *Santobello case, supra,* which involved, like the *Ewing* case, an apparent inadvertent breach of the Government's promise, as in both cases a second and different prosecutor appeared at the contested sentencing hearing. The *Ewing* court held, as this Court held in *Santobello,* that it was immaterial whether the violation of the Prosecution's promises was intentional or unintentional. It should be noted that in the instant case, the same Prosecutor appeared at Petitioner's guilty plea, original sentencing, and Rule 35 hearing. In *Ewing,* the court found that the breach having occurred at the hearing on Ewing's Rule 35 motion as opposed to the initial sentencing hearing was of little distinction as:

> "Both of these proceedings were integral parts of the sentencing process in this case. Surely when Ewing obtained the Government's promise not to oppose probation in exchange for his plea of guilty, he did so in the expectation that the benefits of that promise would be available throughout the proceedings relevant to the determination of his sentence. The Government was obligated to fulfill its commitment at least until the question of the Ewing sentence was finally resolved by the sentencing judge." at 1143.

The remedy that the *Ewing* court found appropriate was that since the Government breached its promise at the sentence reduction hearing, Ewing was not entitled to have his plea set aside but should be given the opportunity to

have the same motion for reduction of sentence submitted to a different Judge before whom the Government would be precluded from opposing probation.

The circuits that have declined to follow *Ewing* have found distinguishing facts so as to not find a breach of a plea agreement at a Rule 35 motion. In *Bergman* v. *Lefkowitz*, 569 F.2d 705 (CA 2 1977), and *United States* v. *Mooney*, 654 F.2d 482 (CA 7 1981), the Second and Seventh Circuits, respectively, found that the plea agreement did not breach the Rule 35 motion as there was no explicit promise in the plea agreement not to oppose a Rule 35 motion to reduce sentence. In *United States* v. *Ligori*, 658 F.2d 130 (CA 3 1981), the Third Circuit found that the plea agreement covered only the original sentencing as the Government as part of the agreement reserved the right to correct any factual inaccuracies contained in the presentence report or that might be made at allocution.

The Fifth Circuit itself found *Ewing* distinguishable in *United States* v. *Johnson* 582 F.2d 335 (CA 5 1978), where the court found that the Government did not breach its bargain not to make a sentence recommendation when, at a Rule 35 hearing, it responded to misinformation concerning the availibility of treatment at various federal correctional facilities submitted by the defendant. The Ninth Circuit in *United States* v. *Arnett*, 628 F.2d 1162 (CA 9 1979), appears to reputiate the law of *Ewing* but then went on to remand the case to the district court for a resolution as to what was actually the terms of a plea bargain where the Government had promised to "take no position as to the appropriate sentence".

The Sixth Circuit in the instant case found that the Government kept its bargain when it agreed to "take no position regarding the sentence to be imposed" as there was no evidence that the Government agreed not to comment at any post-sentence proceeding. Of course, there is no evidence contrariwise that the Government agreed that it

could comment at any post-sentence proceedings. It appears to be inimical to due process in criminal jurisprudence to allow a plea agreement to stand by what was not said.

An analysis of the foregoing cases reflects that the lower courts decisions and attitudes towards this important question of federal law are in a state of conflict and uncertainty. As plea agreements and their ramifications come in to play countless times every day in the Federal system, the question presented for review in this Petition is one of great importance to federal criminal jurisprudence.

Moreover, the instant case is an appropriate case for this Court's analysis of this important question of federal law. In the instant case, the same Prosecutor appeared at Petitioner's plea, sentence and sentence reduction motion. A plea agreement was explicitly stated on the record at Petitioner's plea and was reiterated at Petitioner's sentencing. Lastly, the Prosecutor's comments in opposition to a sentence reduction went squarely to the merits of the sentence, and not any collateral matters or misinformation presented by Petitioner. It is also noteworthy that the sentencing Judge in denying the sentence reduction request stated that the Prosecutor's comments had great merit. It thus appears, that the instant case is a clean and appropriate case to resolve this important issue of federal criminal jurisprudence that arises daily in every district of the federal judiciary.

Respectfully submitted,

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Dated: January 7, 1983

Excerpt from Guilty Plea Transcript of September 25, 1981

(7)

THE COURT: May it be said that your express desire to plead guilty to each of the three charges that you have responded to here is a voluntary plea?

DEFENDANT DENEEN: Yes, your Honor.

THE COURT: Is it of your own free will act?

DEFENDANT DENEEN: Yes, your Honor.

THE COURT: What understandings are there here, Mr. Palus, in this case?

MR. PALUS: It's our understanding that the Defendant will plead in Case Number G81-33 to Counts 3 and 11, and in Case Number G81-97, to Count 1. In exchange for that, after he is sentenced on his plea-based conviction the Government in G81-33 will move to dismiss the other 15 counts, and in G81-97, will move to dismiss Count 2 through 4.

THE COURT: Is that correct, Mr. Kalliel?

MR. KALLIEL: Those counts are to be dismissed as a part of the plea bargain.

MR. PALUS: It's also a part of the plea agreement as we understand it, your Honor, that the Government has agreed that it will take no position regarding the sentence to be imposed by the Court upon Mr. Deneen.

THE COURT: Is that correct, Mr. Kalliel?

MR. KALLIEL: That's correct.

Excerpt from Sentencing Transcript of November 9, 1981

(6)

* * * presentence, to give you my views about Mr. Deneen, to deal with the aspects of publicity he's received, letters that the Court referred to, his plan of rehabilitation, to go over his history, the histories of his family, from childhood until the present time, to also give you the reasons why Mr. Deneen became involved in this situation, and to express to you his feeling and gratitude in a way, that it's all over, that he does not have to anymore play this role that he found himself involved in, and got himself involved in. We went over all those things, and I, on behalf of Mr. Deneen, and I have told him that we have done this, express our gratitude to the Court for having had that kind of an informal, if you will, official discussion, so at least we feel that we have told you everything we can to help Mr. Deneen, carry out our duties as attorneys in this community.

THE COURT: I believe at the discussion this morning in chambers, that Mr. Palus was not heard, is that correct, Mr. Palus?

MR. PALUS: That's right, your Honor.

THE COURT: And is that part and parcel of some understanding or arrangement that you have had?

MR. PALUS: Yes, your Honor. It was part of the plea agreement that the Government would make no comment or recommendation regarding sentence.

**UNITED STATES OF AMERICA
IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

-vs- Case No. G 81-33 Cr.

GARY WAYNE DENEEN,
Defendant.

**MEMORANDUM IN OPPOSITION TO
MOTION FOR SENTENCE REDUCTION**

On or about November 19, 1981, Defendant filed a Motion for Sentence Reduction. Defendant has filed affidavits which suggest his sentence should be reduced because his family will suffer hardships, his business enterprises will be affected, and legal suits require his presence. The government submits such reasons are not sufficient to require the relief requested.

A Fed. R. Crim. P. 35 Motion is addressed to the sound discretion of the trial judge. The only limitations on that discretion are that the sentence not be illegal and the denial not be a gross abuse of discretion. *United States* v. *Nerren*, 613 F.2d 572, 573 (5th Cir. 1980); *United States* v. *Muniz*, 571 F.2d 1344, 1345 (5th Cir. 1978).

A sentence which is within the statutory limits is neither illegal nor an abuse of discretion. *United States* v. *Combie*, 569, F.2d 273, 274-275 (5th Cir. 1978); *United States* v. *Donner*, 528 F.2d 276, 278-280 (7th Cir. 1976).

It is unfortunate that Defendant's business will be affected. Is is sad that his family will be disrupted. These

matters do not, however, remove the fact of what defendant has done.

In *Donner, supra,* the named defendant had broken into a Selective Service office and destroyed records. By the time of sentencing he had become rehabilitated and was working for the Divine Light Mission. 528 F.2d 280. The Appellate Court while upholding a denial of probation stated, at 528 F.2d 230:

> Carlyle tells us that of all acts of man, repentance of one's past deeds and the shaping of future efforts to offset evil by positive good is most divine. But even the truest repentance and most positive efforts to offset prior evil do not carry forgiveness of punishment. Its want emboldens lawlessness and entices others to join in lawbreaking. Crime must have its punishment lest it encourage licentiousness.

Similarly in this case, business and family problems do not offset prior evil, they do not carry forgiveness of punishment. Especially, in a case such as this, to relieve the defendant of his punishment might embolden others similarly situate to continue and begin criminal activity without fear of punishment.

Just as in *Donner, supra*:

> . . . the offense here is an insolent challenge to the integrity of the processes of our government itself—the warp and woof of any free society. To let such an offense go unpunished would be a direct affront to the governmental system. We cannot say in the light of these circumstances that the refusal to grant probation was an abuse of discretion. 528 F.2d 280.

This Honorable Court has already seen fit to show mercy by its sentence. Defendant is not entitled to more.

For all these reasons, the relief requested by defendant should be denied.

Respectfully submitted,
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United States Attorney
By Martin F. Palus
Assistant United States Attorney
544 Federal Building
Grand Rapids, MI 49503
(616) 456-2404

Dated: November 27, 1981

Excerpt from Prosecutor's Comments
Hearing of November 27, 1981

EXCERPT FROM PROSECUTOR'S COMMENTS AT SENTENCE REDUCTION HEARING OF NOVEMBER 27, 1981

(74)

* * *

MR. PALUS: I just have some brief comments to make, your Honor. As the Court knows, we did not make any recommendation or any arguments concerning the sentence when it was imposed as part of our agreement for the plea. However, this Court received the presentence report, and the input of the defense in that presentence report prior to imposing the sentence which has been imposed, which as the Court knows is quite a bit less than the maximum that could have been imposed on Mr. Deneen. Your Honor, I don't think that by having this hearing, by submitting the affidavits, Defendant has added anything to the concerns and ideas and rationales that were presented to the Court at the time of the sentencing. It is true that his family will be disrupted if he goes to prison. It happens to anyone who has a family that gets sentenced to prison. It is true his business would be affected if (75) he goes to prison. That is true of anybody who commits a crime and is sentenced to prison who has a business, and it seems, your Honor, that in all of this presentation by the Defendant, it's always somebody else's fault. It's always the Mikes' who got him into this. It's always the finance companies that make it so easy, and now if he goes to prison because of what he has done, it's the Court's fault for not putting him on probation as he would like to be.

But, it is in fact no one's fault but Mr. Deneen's. Mr. Deneen freely lied, cheated and stole, and he's sorry for that now, and as we point out in our brief in the Donner case, your Honor, as the Court knows Mr. Donner had done a complete turn around in his life. He went from a anti-social revolutionary to sacrificing his life for his fellow man at the Divine Mission. In that case, the trial court saw

Excerpt from Prosecutor's Comments
Hearing of November 27, 1981

fit to sentence him to three years imprisonment for what he had done. He appealed saying he should have had probation, and the appellate court pointed out that it is indeed almost divine to feel repentance and to try to undo the evil you had done, and then pointed out, "But even if the truest repentance and most positive efforts to offset prior evil do not carry forgiveness of punishment. Its want emboldens lawlessness and entices others to join in lawbreaking. Crime must (76) have its punishment lest it encourage licentiousness." In this case, I think this Court considered all the requests and concerns of the defense, and also considered the Donner cloak when it sentenced Mr. Deneen, and we would suggest to the Court that defense has not presented anything to the Court to change that, or it has already shown to Mr. Deneen mercy when it originally imposed the sentence, and we suggest to the Court that it is a legal sentence, and that it should remain.

Excerpt from Findings and Decision
Hearing of November 27, 1981

EXCERPT FROM DISTRICT COURT JUDGE'S FINDINGS AND DECISION AT SENTENCE REDUCTION HEARING OF NOVEMBER 27, 1981

(85)

* * * but I don't give it a lot of points either.

There is really no way that Gary Deneen can ever pay back what has happened. The United States Attorney has put his finger on it, for what he has done to his family, and when we get to a place in life where we command the respect of many other people, there is an added obligation on us, or when we deal in hundreds of thousands of dollars, and when we have employees, we stop and think before we take action. This is expected of us. What has been done can never be paid back. The cost to the Government and the federal bankruptcy judge and the Court, the officials, the 23 Grand Jurors who met in this case, gave up a portion of their lives and their money and their days on the job, and otherwise to come and hear this matter; FBI agents who were employed over many, many days in its investigation; probation officers who were kept busy in this Court; the United States Attorneys who are involved in this. This Court has spent a considerable, I should not say an inordinate amount of time, because there is no case in which—criminal case that I would call an inordinate amount of time, but if we were to have to calculate the cost that have already gone to the United States Government in this case, would be in excess of $25,000, and that will not be paid back, that will be paid by and is paid by the taxpayers of this country. Those are but a * * *

Order Denying Reduction of Sentence
Filed December 7, 1981

DISTRICT COURT ORDER
DENYING REDUCTION OF SENTENCE
DATED DECEMBER 7, 1981

On November 9, 1981, following a plea of guilty in Case No. G81-33 CR to charges of mail fraud in violation of 18 U.S.C. § 1341 (Count 3) and interstate transportation of stolen property in violation of 18 U.S.C. §§ 2314 and 2 (Count 11), defendant was sentenced to a term of five years on Count 3 and nine years on Count 11.

On the same day, following a plea of guilty in Case No. G81-97 CR to a charge of interstate transportation of stolen property (Count 1) in violation of 18 U.S.C. § 2314, defendant was sentenced to a term of nine years.

All sentences were adjudged to run concurrently. The judgments further provided that defendant was to report to the designated institution for commencement of his sentences on November 30, 1981.

Defendant has now moved for a reduction of sentence in each of these cases under the provisions of Rule 35 of the Federal Rules of Criminal Procedure. The court has duly considered the motions, the memoranda, and the affidavits filed in support thereof. The court concludes that a reduction of sentences previously imposed is not warranted. The motions to reduce the sentences are therefore denied.

IT IS SO ORDERED.

Dated: November 27, 1981

(s) Wendell A. Miles
Judge, United States District Court

Order Filed September 17, 1982

ORDER OF THE SIXTH CIRCUIT COURT OF APPEALS DATED SEPTEMBER 17, 1982

(Filed: September 17, 1982)

Before: EDWARDS, Chief Judge; ENGEL, Circuit Judge; and HOFFMAN, Senior District Judge*

Appellant Gary Wayne Deneen appeals from a decision of the district court denying his motion made under Rule 35 of the Federal Rules of Criminal Procedure. Deneen had been the subject of a 17-count indictment by a grand jury from the Western District of Michigan and a 4-count indictment entered by a grand jury for the Eastern District of Wisconsin. Following transfer of the Wisconsin case to the Western District of Michigan pursuant to Federal Rule of Criminal Procedure 20, Deneen pled guilty to one count each of mail fraud, interstate transportation of stolen money and securities, and interstate transportation of falsely made, forged, altered or counterfeit securities. In exchange for the guilty pleas, the government agreed to dismiss the remaining counts and to take no position regarding the sentence to be imposed. The district court sentenced Deneen to concurrent terms on the three counts of five years, nine years, and nine years, respectively. Deneen then moved for a Rule 35 hearing to reduce sentence. At the Rule 35 hearing, the government suggested that Deneen's sentence remain the same and commented on his character and prior acts. Following denial of his motion to reduce sentence, Deneen filed a notice of appeal.

Deneen relies upon the unpublished decision of this court in *Angus* v. *United States*, No. 80-5005 (6th Cir. February 17, 1981), as authority that the government's comments at the Rule 35 hearing amounted to a violation of its plea bargain and required a vacation of the judgment of the district court and a remand for resubmission of his Rule 35 motion before a district judge. *Angus*, in turn, relied upon certain language employed in *United States* v. *Ewing*, 480 F.2d 1141 (5th Cir. 1973).

Order Filed September 17, 1982

Upon consideration the court finds *Angus* v. *United States, supra,* inapposite. In *Angus,* it was apparent that the government's plea bargain included an agreement not to oppose Angus' request for probation, a bargain it failed to keep when it, in fact, opposed Angus' request for probation at the Rule 35 hearing. Here, the sole promise of the government respecting the sentence was that it would "take no position regarding the sentence to be imposed." The court considers that the government kept its bargain, and while perhaps it could have agreed not to comment at any post-sentence proceedings, there was no evidence that it did in fact do so. In the absence of such a specific agreement, the government retained the freedom to comment as it did. Accordingly,

IT IS ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

Order Filed September 17, 1982

Re: Nos. 81-1763/1764
United States of America v. *Gary Wayne Deneen*

HOFFMAN, Senior District Judge, concurring specially.

While I concur in the order in the above cases, I write separately to express my views because of the interaction of Rule 35 with Rule 11, and my concern as to the unpublished opinion of this court in *Angus* v. *United States*, No. 80-5005, decided February 17, 1981.

A review of the briefs in *Angus* will demonstrate why the court decided to rely upon *United States* v. *Ewing*, 480 F.2d 1141 (5th Cir. 1973). *Angus* involved a plea agreement wherein Angus agreed to plead guilty to conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. § 846. The Government, on its part, agreed to move to dismiss the remaining ten counts, that it would not oppose a probationary sentence, and would also agree that Angus receive *no more than* six years incarceration under 18 U.S.C. § 4205(b)(2). On November 11, 1977, Angus was sentenced to a term of six years under § 4205(b)(2), with a special parole term of three years.[1] At the sentencing hearing, the Government fully complied with its agreement. Angus thereafter appealed with this court affirming the conviction and certiorari being denied.

Approximately twenty months after sentence was imposed, Angus filed his first Rule 35 motion to reduce his sentence, said motion being timely filed within 120 days from the denial of the petition for a writ of ceritorari. The Government responded, opposing any reduction of sentence and any stay of execution because "it is highly unlikely that the balance of the present motion will result in a probationary sentence for the defendant." Thereafter, the district judge reduced the sentence to four years under 18 U.S.C. § 4205(b)(2).

[1] The special parole term was rendered nugatory under *Bifulco* v. *United States*, 447 U.S. 381 (1980), although the *Angus* unpublished opinion fails to mention *Bifulco*.

Angus then filed a further motion to reduce the sentence and contended that the Government violated the plea agreement by opposing the initial Rule 35 motion, relying entirely upon *Santobello* v. *New York*, 404 U.S. 257 (1971) (where the *violation occurred at the sentencing hearing* following the prosecutor's agreement to make no recommendation as to sentence but, at the sentencing hearing, the prosecutor recommended that the maximum sentence be imposed), and *United States* v. *Ewing*, 480 F.2d 1141 (5th Cir. 1973) (where the alleged violation occurred at a Rule 35 hearing) with the latter court stating:

> The fact that the prosecution fulfilled its commitment at the initial sentencing only to breach it at the subsequent hearing on [a] motion for reduction of sentence . . . [is a] distinction of little import because *both of these proceedings were integral parts of the sentencing process in this case*. Surely when [he] obtained the Government's promise not to oppose probation in exchange for his plea of guilty, he did so in the expectation that the benefits of that promise would be available throughout the proceedings relevant to the determination of his sentence. (Emphasis supplied).

Ewing cites no authority for the proposition that a Rule 35 hearing is an integral part of the sentencing process. Indeed, it is *not* an integral part of the sentencing process, but *is* an integral part of the *post-sentencing remedies* made available under Rule 35(b). One need only consider the fact that, under a Rule 35(b) motion for reduction of sentence, there is no absolute right to a hearing as the motion is frequently considered by the judge informally and in chambers; a defendant has no constitutional right to be personally present or to be represented by counsel at any consideration of the motion. *United States* v *Donohoe*, 458 F.2d 237 (10th Cir. 1972). Assuredly, the 120-day time limitation for filing a motion under Rule 35(b) does not run anew from any reduction of the sentence; it still commences at the

time the sentence was imposed in the first instance. And, of course, an appeal may be immediately noted after sentence is imposed.

In *United States* v. *Behrens*, 375 U.S. 162 (1963), the Court discussed the relationship between Rule 35 and a sentence imposed under 18 U.S.C. § 4208(b) [now 18 U.S.C. § 4205(c)]. In *Behrens*, the district court first imposed a maximum sentence of 20 years to "be subject to modification in accordance with Title 18, U.S.C. § 4208(b)." After receipt of the report from the Director of the Bureau of Prisons, the district court entered an order providing "that the period of imprisonment heretofore imposed be reduced to Five (5) years", but neither the defendant nor his counsel was present when the modification order was entered. In considering the necessity of the defendant and his counsel to be present in a Rule 35 proceeding, Justice Black, speaking for the Court, said:

> It is true that the same rule [Rule 43] provides that a defendant's presence is not required when his sentence is reduced under Rule 35. But a reduction of sentence under Rule 35 is quite different from the final determination under § 4208(b) of what a sentence is to be. Rule 35 refers to the power of a court to reduce a sentence which has already become final in every respect.

Thus, the *Behrens* court held that a defendant must be present at the time of final sentencing under § 4208(b), the Court also pointing out that a defendant has the right to speak in his own behalf under Rule 32(a) [now Rule 32(a)(1)] of the Federal Rules of Criminal Procedure. And in the companion case, *Corey* v. *United States*, 375 U.S. 169 (1963), decided the same day as *Behrens*, the Court reversed the Circuit Court of Appeals for the First Circuit, which had dismissed as untimely an appeal from the *final* sentence pursuant to § 4208(b) by holding that a timely notice of appeal could be filed, at the option of the defen-

dant, after the initial sentence under § 4208(b), *or* after the final sentence subsequent to the receipt of the report from the Director of the Bureau of Prisons. While *Corey* did not discuss Rule 35, it does state what is meant by a final judgment where it says a "Final judgment in a criminal case . . . means sentence. The sentence is the judgment", citing *Berman* v. *United States*, 302 U.S. 211, 212 and *Korematsu* v. *United States*, 319 U.S. 432, 434.

Based upon these teachings, I respectfully disagree with the *Ewing* case, as well as the unpublished opinion in *Angus* which relies solely upon *Ewing*. However, in fairness to the *Angus* panel it should be noted that the Government *conceded* that it "did inadvertently oppose the Defendant's initial motion to reduce [the] sentence to probation", thus tacitly confessing error and without endeavoring to point out any error in the *Ewing* ruling despite the fact that *Ewing* had been criticized in the intervening period.

The Third Circuit, in *United States* v. *Ligori*, 658 F.2d 130 (1981) has expressly repudiated *Ewing*. The Seventh Circuit, in *United States* v. *Mooney*, 654 F.2d 482 (1981), has said: "In the absence of any indication that the parties expected the Government not to oppose a Rule 35 motion, we would hesitate to imply such a condition." *United States* v. *Arnett*, 628 F.2d 1162 (9th Cir. 1979), holds to this effect, although the case was remanded to the same trial judge to determine the dispute, if any, as to the terms of the plea agreement. The Second Circuit, in *Bergman* v. *Lefkowitz*, 569 F.2d 705 (1977), rejected the defendant's argument that the prosecution violated the plea agreement to recommend no additional sentence merely by opposing the motion to reduce the sentence. Even the Fifth Circuit has tempered its *Ewing* opinion in *United States* v. *Johnson*, 582 F.2d 335 (1978), by saying "*United States* v. *Ewing*, *supra*, does not give the defendant the right to present an unopposed Rule 35 motion. The government violates *Ewing*

only when its opposition violates the essence of the plea bargain."

While I agree that some prosecutor could conceivably bargain not to oppose a Rule 35 motion, or a motion under 28 U.S.C. § 2255, and such an agreement could be upheld under *Santobello*, it stretches my imagination to say that, in a separate proceeding following final judgment from which an appeal can be noted forthwith, there can be a "silence forever" edict imposed upon the prosecution.

Rule 35 is now in the process of amendment by resolving a conflict in the circuits where the *execution* of the sentence has been suspended, the defendant placed on probation, and his probation is later revoked. The Second Circuit in *United States* v. *Kahane*, 527 F.2d 491 (1975), held that a Rule 35 motion filed after probation was revoked was untimely. The Third Circuit disagreed in *United States* v. *Johnson*, 634 F.2d 94 (1980), holding that the 120-day time limitation runs from the date of revocation of probation. If the views of the Advisory Committee on Criminal Rules are upheld, the amendment will agree with the Third Circuit and will thus permit a Rule 35 motion to be filed within 120 days from the date of revocation of probation. The effect of sustaining the *Ewing* ruling in this situation is significant. A prosecutor could agree not to make any recommendation as to the sentence to be imposed and adhere to that agreement at the time of sentencing. The district judge imposes a sentence, but suspends the execution of that sentence and places the defendant on probation for a given period of years not, of course, in excess of five. Within the time period of the probation, the defendant violates the terms of the probation and probation is revoked. He then, under the proposed amendment to Rule 35, files a motion for reduction of sentence. According to *Ewing* and *Angus*, the prosecutor is foreclosed from commenting as to whether the originally imposed sentence should be reduced. I cannot subscribe to sealing the lips of

the prosecutor beyond the time that he committed himself to remain silent, or otherwise not to oppose a request for probation. A Rule 35(b) motion presupposes a valid sentence which is complete and final in every respect. Vo. 8A, Moore's Federal Practice, § 35.02[1].

The history of Rule 35 lends support to the conclusion that it is not an integral part of the sentencing process, but is indeed, a post-sentence remedy made available to a defendant if exercised within a specified number of days. To fix a definite time limitation which previously had fluctuated by reason of terms of court fixed by local rules was one of the primary reasons for what is now Rule 35. After the expiration of the term of court, there was no power to reduce a sentence prior to the passage of Rule 35. Once the service of the sentence had actually commenced, the right to modify the sentence no longer existed even during the same term of court. *United States* v. *Murray*, 275 U.S. 347, 358 (1928). Some local rules carried provisions for extending the terms of court, and these extension orders were frequently entered to permit judges to give further consideration to reducing sentences already imposed. There were, indeed, cogent reasons for adopting Rule 35 but, aside from the foregoing, the basic reasoning is set forth in Moore's Federal Practice, Vol. 8A, § 35.02[1], where it is said:

> The psychological principle upon which the motion seems to be premised is that passage of time may find the sentencing judge in a more sympathetic or receptive frame of mind. This principle is likely to operate differently depending upon whether the sentence is imposed upon a plea of guilty or after trial. In the latter case the trial judge's reaction to defendant's alleged perjury on the stand, or to the fact that he went to trial at all, may moderate when the immediacy of the trial has faded.

Judges are human. On the day of sentencing he or she may have been ill or irritated by circumstances unrelated to the

trial of a defendant. Rule 35(b) affords a judge an opportunity to reconsider his prior action. It is a separate but independent proceeding and any agreement by a prosecutor, unless expressly stated otherwise, should be limited to the original sentencing hearing.

In the case under consideration, the Rule 35 hearing was conducted under circumstances which brought forth no objection as to any participation or statement by the Assistant United States Attorney. No suggestion was made that the matter should be considered by another judge until appellant's brief on appeal was filed. The hearing on the motion reflected no possible bias or prejudice on the part of the judge. These factors alone would be sufficient for me to affirm the action of the trial court in denying the Rule 35 motion but, as convinced as I am that *Ewing* was improperly decided, I advance my views as to the more important question of whether Rule 35(b) is an integral part of the sentencing process or, as I believe, whether it is merely an integral part of the post-sentencing remedies available under Rule 35(b).

ORDER DENYING PETITION FOR REHEARING DATED NOVEMBER 18, 1982
(Filed: November 18, 1982)

Before: EDWARDS: Chief Judge; ENGEL, Circuit Judge; and HOFFMAN, Senior District Judge*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

* Honorable Walter E. Hoffman, Senior Judge, U.S. District Court for the Eastern District of Virginia, sitting by designation.